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No. 83-1884

In the Supreme Court of the United States

OCTOBER TERM, 1984

WINSTON BRYANT MCCONNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Miller v. *United States*, 357 U.S. 301 5

Sabbath v. *United States*, 391 U.S. 585 4

United States v. *Bustamante-Gamez*, 488 F.2d 4, cert. denied, 416 U.S. 970 3

United States v. *Kane*, 637 F.2d 974 5

United States v. *Montano*, 613 F.2d 147 5

United States v. *Moreno*, 701 F.2d 815, petition for cert. pending, No. 83-396 5

United States v. *Pratter*, 465 F.2d 227 5

Statutes:

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962 2

18 U.S.C. 922(h) 1

18 U.S.C. 3109 ..... 3, 5

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Petitioner contends that exigent circumstances did not excuse the failure of law enforcement officers to wait for petitioner to refuse admittance before entering petitioner's home to execute a warrant for his arrest.

1. Following a bench trial in the United States District Court for the Northern District of California, petitioner was convicted of receiving firearms shipped in interstate commerce after having been convicted of a felony, in violation of 18 U.S.C. 922(h). He was sentenced to five years' imprisonment and fined $5,000. A panel of the court of apepals reversed petitioner's conviction, holding that the district court had erred in denying petitioner's motion to suppress firearms seized inside petitioner's house following his arrest. The court of appeals granted the government's petition for rehearing en banc, however, and the en banc court affirmed petitioner's conviction by a 9 to 2 vote (Pet. App. A1-A79; 728 F.2d 1195).

In an indictment filed in the United States District Court for the Northern District of California on June 12, 1979, petitioner and 31 others were charged with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962 (Pet. App. A2). The indictment named the Hell's Angels Motorcycle Club as the enterprise and listed numerous predicate racketeering acts, including murder, attempted murder, use of firearms and explosives, and large scale drug dealing. The next day, federal officers executed search and arrest warrants at petitioner's house (*id.* at A3). The officers were led by DEA Agent Olson, who, while serving in an undercover capacity, had a close relationship with petitioner (*id.* at A3, A41). Olson knew that petitioner was a convicted felon, a drug dealer and an associate of the Hell's Angels. He also knew that some members of the Hell's Angels carried guns and explosives and had been involved in murders (Tr. 347). In addition, petitioner had once stated to Olson that members of the Hell's Angels would "protect[] * * * members of the club" (Pet. App. A41).

When the officers approached petitioner's residence at about 8:30 p.m., the solid front door was open but a screen door was closed. Agent Olson knocked on the screen door and announced his identity and purpose. As he knocked, the agent saw petitioner, whom he recognized immediately. Between the door and petitioner the agent saw another man sitting with his back to the door. Without waiting for a response or a refusal of entry, Olson opened the screen door, entered the house, and arrested petitioner. While petitioner was being handcuffed, one of the other agents found a loaded handgun under a sofa cushion. The agents found another gun during a subsequent warrant-authorized search of the house. These firearms formed the basis of the charge for which petitioner was convicted. Pet. App. A3-A4.

In affirming petitioner's conviction, the en banc court of appeals concluded that Agent Olson's failure to comply with 18 U.S.C. 3109[1] was excused by exigent circumstances. Relying upon its earlier decision in *United States* v. *Bustamante-Gamez*, 488 F.2d 4, 11 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974), the court held that where the "police have properly knocked and announced their identity and purpose, mild exigency is sufficient to justify simultaneous entry when entry can be accomplished without physical destruction of property" (Pet. App. A39). The court found that that standard was satisfied here because Agent Olson was aware of petitioner's prior criminal record and his participation in offenses (drugs and racketeering) that often involve possession of firearms, and petitioner had suggested that members of the Hell's Angels would use violence to "protect[]" other members of the club (*id.* at A41).

2. Petitioner contends that the circumstances surrounding the officers' entry into his home were not sufficiently exigent to excuse the failure to comply with 18 U.S.C. 3109 and that, consequently, the guns seized following that entry should have been suppressed. Specifically, petitioner challenges the court of appeals' holding that only "mild exigency" is needed to justify entry when the police enter without destroying physical property. It is our submission that, under any standard, exigent circumstances fully justified the officers' actions here. Accordingly, further review of this fact-bound issue is unwarranted.

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[1] 18 U.S.C. 3109 provides:

> The officer may break open any outer or innner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance.

Agent Olson testified that he did not wait to be refused admittance before entering petitioner's home because he feared for the safety of his men (Tr. 348). His fear was objectively reasonable. Agent Olson knew that petitioner was a convicted felon, a drug dealer and an associate of the Hell's Angels. The agent knew that club members carried guns and explosives and had been involved in murders (Tr. 347). The indictment, upon which the warrant for petitioner's arrest was based, charged 32 persons, including petitioner, with participating in the affairs of an enterprise through such acts of racketeering as murder, attempted murder, use of firearms and explosives, and large scale drug dealing. While operating in an undercover capacity, Agent Olson heard petitioner state that "his people" — the Hell's Angels — were armed and would "protect" their associates (Pet. App. A41; Tr. 350-351). Under these circumstances, Agent Olson acted reasonably in promptly entering the house and apprehending petitioner before he or his companion could arm themselves and attempt to resist entry.[2]

Indeed, it is at the least questionable whether the waiting requirement of Section 3109 applied to the entry here, quite apart from the presence of exigent circumstances. The pushing open of an unlocked screen door involves no "breaking." While *Sabbath* v. *United States*, 391 U.S. 585, 589-590 & n.5 (1968), suggests that the statute would regulate an *unannounced* entry through even such a door, there was here an adequate announcement of identity and purpose. The requirement of announcement makes sense even where the officers are standing outside an unlocked screen door, in

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[2]Although we acknowledge that a search may not be justified by the evidence it uncovers, we note that the reasonableness of Agent Olson's immediate entry into petitioner's house was confirmed by the subsequent discovery of a loaded handgun under a sofa cushion in close proximity to petitioner (Pet. App. A44).

light of the purposes underlying Section 3109's requirements — *viz.*, the protection of "the individual's right of privacy in his house" (*Miller* v. *United States*, 357 U.S. 301 (1958)), and "the safeguard[ing of] officers, who might be mistaken," upon an unannounced intrusion into a home, for someone with no right to be there (*id.* at 313 n.12). But the same cannot be said of the requirement to await admission by the occupants, when the occupants are visible to the officers, and vice versa, so that the situation is not materially different from an entry through an open door. In any event, because the circumstances permitting immediate entry were exigent under any standard, there is no need for this Court to pass on the validity of the "mild exigency" standard articulated by the court of appeals.[3]

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[3]The cases cited by petitioner (Pet. 15-21) to support his claim of an intercircuit conflict are distinguishable. For example, in *United States* v. *Pratter*, 465 F.2d 227 (7th Cir. 1972), unlike this case, there was no evidence that the officers believed the occupants of the house (a student couple) to be armed and dangerous, and the agents themselves did not believe it was necessary to make a prompt entry. In *United States* v. *Montano*, 613 F.2d 147 (6th Cir. 1980), one member of the panel concluded that a warrantless entry without announcement of authority violated Section 3109 on the facts of that case (*id.* at 151-154 (Edwards, J., concurring)), one judge did not reach that issue (*id.* at 148-151 (opinion of Peck, J.)), and the other judge concluded that exigent circumstances justified the forcible entry (*id.* at 154-157 (Weick, J., dissenting)). Finally, in *United States* v. *Kane*, 637 F.2d 974 (3d Cir. 1981), the court, in affirming the defendant's conviction, held that exigent circumstances excused the agents' failure to announce their authority and purpose; thus, the result in *Kane* is consistent with the result in this case.

Petitioner's claim (Pet. 21-25) that the en banc decision below conflicts with prior panel opinions of the Ninth Circuit obviously does not establish even an intracircuit conflict, since the en banc decision has the effect of overruling any inconsistent prior panel decisions. In addition, petitioner's citation (Pet. 24) of *United States* v. *Moreno*, 701 F.2d 815 (9th Cir. 1983), petition for cert. pending, No. 83-396, is unavailing. In *Moreno*, agents executing a search warrant complied

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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with Section 3109 by announcing their authority and awaiting admittance at the door to the defendant's apartment; the court of appeals held, however, that the agents should have announced themselves at an outer gate leading to an alcove in front of the apartment.

DOJ-1984-08